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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE GUADALUPE AVINA, Defendant and Appellant.	E046038 (Super.Ct.No. INF050237) OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood, Judge. Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Jose Guadalupe Avina guilty of committing two counts of lewd acts on a child under the age of 14 (Pen. Code, § 288, subd. (a), counts 1 & 2)[1] and that defendant had engaged in substantial sexual conduct with the minor (§ 1203.066, subd. (a)(8)).[2] Defendant was sentenced to a total term of 10 years in state prison: the upper term of eight years on count 1, and a consecutive two years for count 2. On appeal, defendant contends (1) CALCRIM Nos. 223, 226, and 302 are erroneous, and even if this court concludes they are not erroneous as written, they were ambiguous, and it was reasonably likely the jury applied the instructions in a way that violated his state and federal constitutional rights; and (2) the trial court erred in imposing the upper term on count 1. We reject these contentions and affirm the judgment.

I

FACTUAL BACKGROUND

A.D. and C.R. had been married 10 years before they separated in 2002. At the time of the separation, they had three children: a daughter, age 12; a son, age seven; and Jane Doe, age five. C.R. also had another son from a previous relationship who was 13.

Beginning in December 2002, C.R. and her children lived with defendant in an apartment in Indio. In September 2003, C.R. and defendant had a baby girl. Defendant cared for the children while C.R. worked a 3:00 p.m. to 11:00 p.m. shift at a casino.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant was found not guilty of three remaining counts of committing a lewd act on a child under the age of 14. (§ 288, subd. (a), counts 3-5.)

During the time C.R. and A.D. were separated, A.D. visited with his children on the weekends. During one of those visits in 2004, Jane surprised her father by attempting to grab his penis and kiss him on the mouth. A.D. asked about her behavior but failed to get a satisfactory explanation. A.D. mentioned the incident to C.R., and the two became concerned that Jane had been molested by defendant. On June 3, 2004, they arranged to have an examination conducted, after which medical personnel contacted the police. C.R. and her children subsequently moved out of the apartment they were sharing with defendant.

In an interview with an investigator on June 9, 2004, and during her testimony at trial, Jane revealed that on at least five separate occasions defendant had taken off her clothes and kissed her with his mouth open. After kissing her, he would also insert his finger into her vagina and her anal cavity. Jane would tell defendant to stop, but he refused to do so. These incidents occurred when Jane was alone in the bedroom with defendant. Following the incidents, defendant would tell Jane not to say anything to her mother.

In a January 2005 interview with a detective, defendant initially denied the allegations, claiming Jane's father was behind the accusations. However, he later admitted to the acts against Jane but gave no reason for doing so. At the detective's request, defendant also wrote a letter to Jane apologizing for what he had done to her.

At trial, defendant denied committing the acts against Jane. He had admitted to kissing Jane but only on her forehead. He claimed that he had only confessed because he believed he would not be allowed to see his own daughter again unless he did so. He continued to maintain that Jane's father was behind the charges against him, and that Jane had been brainwashed.

II

DISCUSSION

A. *Jury Instructions*

Defendant contends that CALCRIM No. 223 (direct and circumstantial evidence), No. 226 (credibility of witnesses), and No. 302 (evaluating conflicting evidence) are erroneous, as they lessen the prosecution's burden of establishing his guilt beyond a reasonable doubt. Defendant argues, in the alternative, that if we conclude that the instructions are not erroneous, it is reasonably likely the jury applied the instructions in the instant case in a way that violated his state and federal constitutional rights. As defendant recognizes, his arguments have been soundly rejected by our colleagues in both the Third and Fifth Districts in *People v. Anderson* (2007) 152 Cal.App.4th 919 (*Anderson*) and *People v. Ibarra* (2007) 156 Cal.App.4th 1174 (*Ibarra*). We adopt the reasoning in those opinions and affirm.

Preliminarily, although an appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant were affected thereby (§ 1259; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503-506), failure to object forfeits the issue unless the error affects the defendant's substantial rights

(*Anderson, supra*, 152 Cal.App.4th at p. 927). We, therefore, review the challenged instructions to determine if defendant's rights were affected by the instructions, that is, "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts." (*People v. Kelly* (1992) 1 Cal.4th 495, 525.) "'Not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 192.)

In deciding whether jury instructions correctly convey the law, the reviewing court must look to the instructions as a whole to see whether there is a reasonable likelihood the jury misunderstood the instructions. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Jurors are presumed to be intelligent and capable of understanding and correlating jury instructions. (*People v. Carey* (2007) 41 Cal.4th 109, 130.) We find no error.

1. *CALCRIM Nos. 223 and 226*

CALCRIM No. 223 defines direct and circumstantial evidence, which a party could present, and explains the difference between the two. The portion of CALCRIM No. 223 that defendant challenges was read by the trial court as follows: "Both *direct* and *circumstantial* evidence are acceptable types of evidence *to prove or disprove* the elements of a charge, including intent and mental state and the acts necessary to a conviction. And neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence." (Italics added.)

Defendant claims the italicized instructional language "tells the jury that the defense has a duty to present evidence to disprove the charge" and is a misstatement of the law.

CALCRIM No. 226 provides guidance for assessing witness credibility. As given by the trial court here, it read: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice that you may have, including any based on the witness's disability, gender, race, religion, sexual orientation, gender identity, age, national origin, or socioeconomic status. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." The court thereafter listed the factors the jurors may consider.

Defendant asserts that, like CALCRIM No. 223, CALCRIM No. 226 "insinuates to the jury that [defendant] was required to disprove some element of the offense with which he was charged," thereby impermissibly lightening the prosecution's burden of proof.

Neither instruction suggests a defendant bears any burden of proof at trial. CALCRIM No. 223 accurately states that either direct or circumstantial evidence may disprove the elements of a charge. This statement does not implicitly or explicitly suggest the defendant has any burden of proof, especially when read in conjunction with

the reasonable doubt instruction, CALCRIM No. 220. There was no misstatement of law or error in this pattern instruction. (*Ibarra*, *supra*, 156 Cal.App.4th at pp. 1186-1187; see also *Anderson*, *supra*, 152 Cal.App.4th at pp. 930-932.)

The same is true in regard to CALCRIM No. 226. CALCRIM No. 226 cannot reasonably be understood to mean that the defense has the burden of disproving the charge. It tells the jury that it must judge the credibility or believability of the witnesses, and outlines some considerations bearing on the jury's determination of credibility. This pattern instruction mirrors the criteria set out in the Evidence Code as a general catalog of those matters having any tendency in reason to affect the credibility of a witness. (Evid. Code, § 780.) The language at issue is not the focal part of the instruction. The crucial point of CALCRIM No. 226 is to inform jurors that they should not automatically reject or discredit a witness because of discrepancies and inconsistencies in the testimony. CALCRIM No. 226 is an accurate statement of the law. (*Ibarra*, *supra*, 156 Cal.App.4th at p. 1188; see also *People v. Campos* (2007) 156 Cal.App.4th 1228, 1240.)

The sole basis for defendant's challenge appears to be the instructions' use of the word "disprove." However, it is accurate that evidence—either presented by the People or by the defendant—can establish that an element of the charged crimes has not been met. Reasonable jurors would not make the mammoth logical leap from mere use of the word "disprove" to a conclusion that the defendant bears a burden of proof.

Defendant advances essentially the same arguments rejected in *Anderson*, *supra*, 152 Cal.App.4th at pages 929-934 and 938-940, and *Ibarra*, *supra*, 156 Cal.App.4th at pages 1186-1188. We adopt the reasoning of those two decisions and hold that the trial court neither erred nor denied defendant due process or a fair trial by giving these instructions.

2. *CALCRIM No. 302*

CALCRIM No. 302 provides guidance regarding the evaluation of conflicting evidence. As given by the trial court here, CALCRIM No. 302 read: "If you determine there is a conflict in the evidence, *you must decide what evidence*, if any, *to believe*. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of a greater number of witnesses. On the other hand, do not disregard the testimony of any witness *without a reason* or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence *convinces* you, not just the number of witnesses who testify about a certain point." (Italics added.)

Defendant challenges the above-italicized language in the instruction, claiming the instruction "tells the jury it must 'believe' or be 'convinced' by the evidence adduced at trial in order to decide a case," thereby insinuating "the defense is held to a standard of proof that requires a jury to 'believe' defense evidence in order to acquit a criminal defendant." By pointing to isolated phrases in the instruction, defendant also asserts this instruction is a misstatement of the law and allows the jury to convict under an incorrect presumption.

Defendant's complaints about CALCRIM No. 302 are unpersuasive. He merely focuses on a particular sentence, taking a solitary word or phrase out of context, rather than evaluating "the instructions given as a whole." (*People v. Rundle* (2008) 43 Cal.4th 76, 149.) CALCRIM No. 302 does not suggest, explicitly or implicitly, that the defendant has the burden of proof to show his innocence or disprove the People's evidence. CALCRIM No. 302 simply states the accurate and unobjectionable proposition that jurors must decide what evidence, "if any," to believe. The instruction tells the jury how to evaluate conflicting evidence, "if" the jury determines there is a conflict in the evidence.

CALCRIM No. 220, not CALCRIM No. 302, sets forth the People's burden of proof. CALCRIM No. 220 clearly informed the jury that "[a] defendant in a criminal case is presumed to be innocent" and the People must "prove the defendant guilty beyond a reasonable doubt." Reading the instructions as a whole, no reasonable juror would have deduced from the aforementioned portion of CALCRIM No. 302 that defendant had any burden of proof or that the proof beyond a reasonable doubt was "weakened," as defendant suggests.

CALCRIM No. 302 does not create an improper presumption, nor does it create a conflict between the presumption of innocence and the admonition that the jury not favor one side or the other. (*Ibarra, supra*, 156 Cal.App.4th at p. 1191.) "It merely cautions the jurors not to disregard testimony on a whim. In this regard, CALCRIM No. 302 is no different from CALJIC No. 2.22, which cautions jurors not to disregard the testimony of the greater number of witnesses 'merely from caprice, whim or prejudice.'" (*Anderson*,

supra, 152 Cal.App.4th at p. 939.) CALJIC No. 2.22 has been approved by our Supreme Court. (*Anderson*, at p. 939; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885; *Ibarra*, at p. 1190; see also *People v. Felix* (2008) 160 Cal.App.4th 849, 858.) Further, defendant's argument disregards the fact that CALCRIM No. 226 instructed jurors they alone must determine the credibility or believability of the witnesses and set forth a variety of factors they might consider when making this determination. (*Anderson* at p. 939.)

"The instruction mandates that the jury 'decide what evidence, if any, to believe,' regardless of which side introduces the evidence, but does not tell the jury to disregard the prosecution's burden of proof or to decide the case on the basis of disbelief of defense witnesses or presentation of more compelling evidence by the prosecution than by the defense [or on a whim]." (*Ibarra*, *supra*, 156 Cal.App.4th at p. 1191, italics omitted; see also *Anderson*, *supra*, 152 Cal.App.4th at p. 939.)

Defendant "misreads the instruction, which cautions the jury, 'What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.' [Citation.] 'The instruction says nothing about choosing between prosecution and defense witnesses. It merely states the commonsense notion that the number of witnesses who have given testimony on a particular point is not the test for the truth of that point. It does no more. The jury remains free to choose the witness or witnesses it believes and what part of a witness's testimony it finds believable.'" (*Ibarra*, *supra*, 156 Cal.App.4th at p. 1191, italics omitted; see also *Anderson*, *supra*, 152 Cal.App.4th at p. 940; *People v. Felix*, *supra*, 160

Cal.App.4th at p. 858.) There was no misstatement of law or error in reading CALCRIM No. 302 to the jury.

3. *Whether the instructions were ambiguous*

In the alternative, defendant argues that, in the event that this court finds the above challenged instructions valid, the challenged instructions "must be deemed ambiguous for all of the same reasons set forth above." We disagree.

"'When reviewing [a federal constitutional claim concerning] a supposedly ambiguous [i.e., potentially misleading] jury instruction, "'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.'"'" (*People v. Ayala* (2000) 24 Cal.4th 243, 289.) As noted previously, in determining the correctness of jury instructions, we consider the instructions as a whole. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) An instruction can be found to be ambiguous or misleading only if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*People v. Frye* (1998) 18 Cal.4th 894, 957.) We presume that jurors are intelligent and capable of understanding and correlating all jury instructions given. (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80.)

There is no reasonable likelihood here that the jury applied the challenged instructions so as to violate defendant's constitutional rights. CALCRIM No. 223 merely defined the two types of evidence a party could present at trial, i.e., direct and circumstantial and explained the differences between the two. Additionally, the same paragraph containing the challenged language in CALCRIM No. 223 tells the jury to

consider whether a fact has been proved "based on all the evidence." CALCRIM No. 226 was neutral, as explained above, and informed the jury to consider whether or not other evidence proved or disproved a witness's testimony. CALCRIM No. 302 includes the words "if any" immediately following the challenged portion. When the subject phrase is taken as a whole, it plainly informed the jurors that they could believe all of the evidence, part of it, or none of it. We see no reasonable likelihood of the jury misunderstanding the challenged instructions in the manner defendant suggests. The trial court instructed the jury, in a straightforward and unambiguous manner, to evaluate the evidence and the witnesses.

Moreover, the jury was instructed pursuant to CALCRIM No. 220, the instruction on reasonable doubt. This instruction conveyed to the jury that if the People presented no evidence, or insufficient evidence, then the People had not met its burden and defendant was entitled to an acquittal. The court also instructed the jury pursuant to CALCRIM No. 300, which stated that neither side was required to call all witnesses who might have information about the case nor to present all available evidence. The jury was also instructed pursuant to CALCRIM No. 225 (circumstantial evidence: intent or mental state). That instruction told the jurors again that the People had the burden of proof; that the burden was referring to both the charged act and the necessary mental state; that the jury could not rely on circumstantial evidence alone unless each necessary fact was proven beyond a reasonable doubt; and that if there were two reasonable interpretations of the circumstantial evidence, the jury must adopt the one most favorable to defendant.

The court further instructed the jury pursuant to CALCRIM No. 200 (duties of judge and jury) and to consider the instructions together as a whole.

Based on the foregoing, we reject defendant's claims with regard to these instructions.

B. *Upper Term Sentence*

Prior to sentencing, the probation officer filed a probation report, recommending an upper term sentence. The probation officer cited the following factors in aggravation: (1) the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness (Cal. Rules of Court, rule 4.421(a)(1)); (2) the victim was particularly vulnerable (rule 4.421(a)(3)); (3) the manner in which the crime was carried out indicated planning, sophistication, or professionalism (rule 4.421(a)(8)); (4) defendant took advantage of a position of trust or confidence to commit the crime (rule 4.421(a)(11)); and (5) defendant had engaged in violent conduct indicating a serious danger to society (rule 4.421(b)(1)).

Two factors in mitigation were noted: (1) defendant had no, or an insignificant, prior criminal record (Cal. Rules of Court, rule 4.423(b)(1)); and (2) defendant's prior performance on probation or parole was satisfactory (rule 4.423(b)(6)).

At the sentencing hearing, following arguments from counsel, the trial court noted that it had read and considered the probation report. The court thereafter imposed an upper sentence of eight years on count 1, stating, "I'm selecting the upper term because he continues to deny his guilt in this matter. He blames others for his problems. I think

at one point he blamed someone for forcing him to admit his guilt, and it's clear that he's not accepting responsibility for what he did to this young girl."

Defendant argues that the trial court erred in imposing the aggravated term, maintaining that the "denial of guilt and blaming others for his problems, was neither a sound discretionary choice, nor did it serve the interest of justice." He believes imposition of the middle term would have resulted in a more reasonable punishment.

We find that defendant waived this issue on appeal by failing to object to the use of defendant's failure to take responsibility as a factor at the time of sentencing. As a general rule, only "claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*).) The California Supreme Court adopted this waiver rule "to reduce the number of errors committed in the first instance" (*id*. at p. 353), and "the number of costly appeals brought on that basis" (*People v. Welch* (1993) 5 Cal.4th 228, 235). Thus, all "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" raised for the first time on appeal are not subject to review. (*Scott* at p. 353.) "Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Ibid*.) This is because "[t]he parties have ample opportunity to influence the court's sentencing choices under the determinate scheme. . . . In anticipation of the hearing, the defense may file, among other things, a statement in mitigation urging specific sentencing choices and challenging the information and

recommendations contained in the probation report. [Citations.] Relevant argument and evidence also may be presented at sentencing. [Citations.]" (*Id.* at pp. 350-351.)

Here, defendant's assignment of error to the court's discretionary decision to impose the upper term on count 1 is within this waiver rule. Defendant essentially asserts the court improperly relied on his failure to accept responsibility in making its sentencing decision. However, despite the opportunity to do so, the purported error was neither objected to nor otherwise brought to the attention of the court at the sentencing hearing. Defendant acknowledges this fact in his reply brief but asserts an objection would have been futile. The record belies the contention that an objection would have been futile. Thus, defendant has waived the right to contest, for the first time on appeal, the court's consideration of this factor in exercising its discretionary function in sentencing him. (See *Scott, supra*, 9 Cal.4th at pp. 355-356 [defendant's claimed reasons relied on at sentencing were "inapplicable, duplicative, and improperly weighed"]; *People v. Erdelen* (1996) 46 Cal.App.4th 86, 91 [improper dual use of facts to impose upper term waived by failure to object].)

Even if the claim is preserved, we are convinced any error is harmless because it is not reasonably probable the court would have imposed a lesser term had a timely objection been interposed. The five factors cited by the probation officer amply supported the court's sentencing decision. Only a single aggravating factor is necessary to make it lawful for the trial court to impose an aggravated prison term. (*People v. Black* (2007) 41 Cal.4th 799, 815; *People v. Osband* (1996) 13 Cal.4th 622, 728.) It is not reasonably probable the court would have imposed a low term or middle term

sentence, given the five valid factors cited by the probation officer, defendant's seemingly lack of remorse, and the seriousness of the crimes.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

McKINSTER
J.